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# IN THE COURT OF APPEALS OF INDIANA

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| MICHAEL JEFFREY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 85A02-0610-CR-899 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE WABASH SUPERIOR COURT
The Honorable Christopher Goff, Judge
Cause No. 85D01-0512-FD-926

**May 16, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Michael Jeffrey appeals his convictions for Possession of Paraphernalia,[1] a class A misdemeanor, and Possession of Marijuana,[2] a class A misdemeanor, claiming that the drugs and some "snorting devices" were improperly admitted into evidence at trial. Appellant's Br. p. 4, 5. Specifically, Jeffrey contends that a police officer conducted an illegal pat down search of his person and that the subsequent search of a tin and the seizure of drugs constituted a violation of the "plain feel" doctrine. Id. at 5. Concluding that the police officer properly conducted the pat down and finding that the subsequent search of the tin was proper, we affirm the judgment of the trial court.

FACTS

In the early morning hours of December 21, 2005, Wabash Police Officer Josh Prater approached a vehicle on Manchester Avenue traveling the opposite direction with its bright headlights shining. Although Officer Prater signaled the driver to dim the headlights, the driver failed to do so. As a result, Officer Prater turned his police cruiser around, and eventually stopped the other vehicle. The vehicle had turned into a driveway and the driver—Jason Dutton—was attempting to "get into the house quickly" before Officer Prater ordered him back to the vehicle. Tr. p. 20. Officer Prater determined that Dutton did not have a valid driver's license, so he wrote Dutton a citation for the violation.

Shortly thereafter, Wabash County Sheriff's Deputy Matt Shrider arrived and deployed his K-9 unit to check for the presence of illegal drugs. The dog alerted the officers

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[1] Ind. Code § 35-48-4-8.3.

[2] I. C. § 35-48-4-11.

to the presence of drugs in the vehicle. After Dutton gave the officers permission to search the vehicle, Officer Prater ordered the passengers—Jessica Dutton and Jeffrey—to exit the vehicle. Jessica had been sitting in the front passenger seat and Jeffrey was seated directly behind her. Officer Prater then informed Jeffrey that he was going to be patted down for weapons. Jeffrey reached into his pocket and handed Officer Prater a pocketknife. During the pat down, Officer Prater felt a hard object in one of Jeffrey's coverall pockets. When Officer Prater asked Jeffrey about the item, Jeffrey removed the object from his pocket, handed it to Officer Prater, and explained that it was a "mint can." Id. at 59. Officer Prater opened the can and found several Vicodin pills, rolling papers, two "snorting devices," and some marijuana. Id. at 60, 62.

As a result of the incident, Jeffrey was charged with possession of a controlled substance, possession of marijuana, and possession of paraphernalia. Prior to trial, Jeffrey filed a motion to suppress, claiming that the pat down amounted to an unreasonable search and seizure under the Fourth Amendment to the United States Constitution. Thus, Jeffrey claimed that all evidence seized following the pat down search could not be admitted at trial. Following a hearing, the trial court denied Jeffrey's motion, and the matter proceeded to a bench trial on September 6, 2006. Jeffrey was found guilty of possession of marijuana and paraphernalia, but he was acquitted of the controlled substance charge.[3] Jeffrey was subsequently sentenced, and he now appeals.

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[3] The trial court noted that Jeffrey had a prescription for the Vicodin. Tr. p. 98.

## DISCUSSION AND DECISION

### I. Pat Down

Jeffrey first contends that his convictions must be reversed because there was no justification for the pat down. Thus, Jeffrey maintains that all evidence seized following the pat down was inadmissible at trial.

In resolving this issue, we initially observe that the Fourth Amendment to the United States Constitution prohibits warrantless searches. Black v. State, 810 N.E.2d 713, 715 (Ind. 2004). While there are exceptions to the warrant requirement, the burden is on the State to prove that an exception exists. Id. One well-known exception was announced in Terry v. Ohio, 392 U.S. 1 (1968), where the United States Supreme Court determined that a police officer may conduct a "reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Id. at 27. Moreover, the police officer need not be absolutely certain that the individual is armed; rather, the issue is whether a reasonable prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. Wilson v. State, 745 N.E.2d 789, 792 (Ind. 2001). A police officer's authority to conduct a pat down search is dependent upon the nature and extent of his particularized concern for his safety and that of others. Id. When a police officer has reason to place a subject in his vehicle, a pat down is generally reasonable even if the subject has given the officer no particular reason to suspect that he is dangerous. Id.

In this case, the evidence showed that Officer Prater received Dutton's consent to search the vehicle. Tr. p. 69-70. However, before conducting the search, Officer Prater properly ordered Jeffrey and Jessica to exit the vehicle to reduce his vulnerability to an attack. Id. at 78; see Maryland v. Wilson, 519 U.S. 408, 415 (1997) (holding that a police officer may order passengers from a vehicle during a traffic stop).

When Officer Prater realized that the police dog had alerted to the presence of drugs in the vehicle, he could very well have been concerned that weapons might also be in the vicinity. Hence, in light of the increased risk that Officer Prater would have faced during the vehicle search and the presence of drugs that had already been established, it was reasonable for Officer Prater to ensure that Jeffrey was not armed. See Wilson, 745 N.E.2d at 792.

Finally, we note that Officer Prater was also justified in conducting the pat down after Jeffrey had handed him the pocketknife. In our view, the discovery of one weapon justified the pat down for additional weapons. It would have been unwise for Officer Prater to assume that Jeffrey had no more weapons on his person even though Jeffrey had voluntarily given the knife to Officer Prater. As a result, Jeffrey's claim that the evidence should not have been admitted into evidence because the pat down search was unlawful fails.

## II. Plain Feel Doctrine

Jeffrey also contends that even if the pat down search was justified, the subsequent seizure of the mint container was unlawful. Specifically, Jeffrey claims that Officer Prater could not validly search the tin because that object did not feel like a weapon.

As noted above, there are exceptions to the warrant requirement. Black, 810 N.E.2d at

715. Seizure of contraband detected during a Terry search for weapons is permissible under the "plain feel doctrine," which provides that if during a lawful pat down of "the suspect's outer clothing," the officer "feels an object whose contour or mass makes its identity" as contraband "immediately apparent" to that officer, a warrantless seizure of the object is justified. Burkett v. State, 785 N.E.2d 276, 278 (Ind. Ct. App. 2003).

Consent to search may also justify a warrantless search. When the State relies upon this exception to the warrant requirement, it has the burden of proving that the consent was, in fact, freely and voluntarily given. Lyons v. State, 735 N.E.2d 1179, 1185 (Ind. Ct. App. 2000). Whether a consent to search is voluntary is a question of fact to be determined from the totality of the circumstances. Id. An individual's consent to search is valid so long as it is not procured by fraud, duress, fear, or intimidation or where it is merely a submission to the supremacy of the law. Martin v. State, 490 N.E.2d 309, 313 (Ind. 1986). Moreover, the circumstances surrounding the search may demonstrate that the party involved implicitly consented to the search by word or deed. State v. Jorgensen, 526 N.E.2d 1004, 1006 (Ind. Ct. App. 1988).

In this case, Officer Prater testified that he did not know the nature of the object when he felt it. Tr. p. 33. Indeed, Officer Prater admitted that the object "didn't feel like contraband." Id. Hence, Officer Prater was not justified in searching the tin in accordance with the plain feel doctrine. But the evidence also shows that after Officer Prater asked about the object, Jeffrey immediately pulled it from his pocket, handed it to Officer Prater, and indicated that it was a "mint can." Id. at 59. Moreover, when Jeffrey handed the can to

Officer Prater, he never stated that Officer Prater should not open it. Under these circumstances, it is apparent that Jeffrey demonstrated his intent to cooperate with Officer Prater, and impliedly consented to the search of the tin. There is no evidence that the consent was the product of fraud, duress, fear, intimidation, or mere submission to the supremacy of the law. Additionally, there is no evidence showing that Jeffrey was under arrest at the time. Moreover, Jeffrey was not handcuffed, and there was no evidence demonstrating that Jeffrey was threatened or intimidated when he handed the can to Officer Prater. Under these circumstances, Jeffrey cannot successfully complain that Officer Prater's search of the mint can was improper. As a result, we conclude that the trial court did not err in admitting the marijuana and paraphernalia into evidence.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.